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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BEN LEVI FISCHETTO,

Defendant and Appellant.

2d Crim. No. B203350  
(Super. Ct. No. B203350)  
(Ventura County)

Appellant waived his right to a jury trial and was convicted by the court of forcible rape (Pen. Code, § 261, subd. (a)(2))<sup>1</sup> and sodomy by use of force (§ 286, subd. (c)(2)). He filed a motion for a new trial which was denied. The court denied probation and imposed the low term of three years for the forcible rape and a consecutive sentence of two years (one-third the midterm) for the sodomy, for a total term of five years in state prison. Appellant argues that 1) the trial court improperly precluded him from testifying as to his prior relationships with women; and 2) the testimony of the victim's sister was inadmissible hearsay. We affirm.

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<sup>1</sup> All further statutory references are to the Penal Code unless stated otherwise.

## FACTS

### *Prosecution Evidence*

In early 2006, the victim met appellant outside a gas station in Simi Valley. She was 18 years old, and he was 25. They talked about music, his band and exchanged "MySpace" information. Several weeks later, they took a drive in his car. The victim smoked marijuana during the drive. She had taken some Xanax and appellant had to stop several times so she could vomit.

Appellant subsequently took a trip to Las Vegas. While he was gone, the victim sent him pictures of her breasts and vagina via her cell phone. He sent her pictures of his penis. When appellant returned to California, he and the victim made plans to meet again. On March 4, 2006, appellant gave her directions to his house, where he lived with his parents. The victim arrived around 3:00 a.m., on March 5. They met outside the house and went inside to his bedroom. Appellant's parents were asleep. At some point after entering his bedroom, appellant and the victim sat on the bed and began to kiss. Appellant tried to lay the victim down on the bed and she told him she was not ready to do anything beyond kissing. It was too soon in the relationship and she was having her "period."

As the victim was laying on her back, appellant pulled her pants off and she kept saying, "No." He held her down and reached between her legs and pulled out her tampon. He flipped her over and pinned her on her stomach. Appellant spit on his hand and then penetrated her vagina with his penis. The victim continued to tell him to stop and kept trying to push him away. He then penetrated her anus with his penis and it hurt. Appellant flipped her onto her back and again penetrated her vagina with his penis, then ejaculated on her stomach.

The victim saw appellant fall asleep. At approximately 10:00 or 11:00 a.m., she told him she was ready to leave and he walked her to her car. She drove around for awhile and stopped at a 7-Eleven or gas station. She was nervous about what she would tell her parents. The victim's sister, Elena, was present when she arrived home. Elena testified that the victim was hysterical, barely able to sit or

talk and was crying. She told Elena she had been raped, then left the house and drove to a friend's workplace. Elena followed the victim and told her she should not be driving and took her to the hospital. While in the car, the victim told Elena that appellant raped her and held her down and pulled out her tampon and that he also raped her in the "butt."

The investigating officer, Detective Thomas Marshall, testified that he interviewed appellant at the police department after his arrest. Appellant waived his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. A copy of the taped interview and transcript were provided to the court. Appellant recounted that, several weeks after he met the victim at the gas station, they took a drive together. The victim was allegedly "all over him" and asked if he had condoms, but he refused to have sexual intercourse.

On the night of the offense, appellant stated he had been attacked by a police officer earlier in the evening. He denied raping the victim and said they did not have sex because he was drunk and could not get an erection. She "threw herself" at him and he "responded a little bit," then "passed out." He told the officer that he was drunk, but if he had raped her, he would have known because his parents were in the house, and his father "would have walked right in and kicked [his] ass . . . ." Upon further questioning, appellant repeated that he could not get an erection but said he could not remember whether he ejaculated. Appellant said the victim told him she was on her period and he remembered her pulling her tampon out.

Detective Marshall testified that appellant had round bruises near his shoulder blades that could have been "finger marks." He interviewed the victim at about 9:00 p.m., on the day of the rape. During his interview with the victim, she was crying, shaking and pulled herself into a ball in the corner of the couch. She told Marshall that, during the assault, appellant spit in his hand and wiped her anus with his saliva. He then stuck his finger in her anus, then his penis. She continued to tell him to stop and that it was extremely painful.

Several days later, appellant left a message on the victim's cell phone in which he apologized for his behavior. He said: "Sorry about the other night. I was like a little, uh, stupid, kind of drunk, and kind of had a fucked up night before that because I got attacked by a cop, so. Really sorry about that. I hope you don't like hold it against me or whatever and you, you don't take it like a perv nerve or whatever. Anyways, I'm just cruisin' around. Um, I'm probably just gonna kick it at home. I got a lot of shit on my mind as well, so. Give me a call. Later."

The same day, the victim conducted a "cool call" with appellant and their conversation was recorded by Detective Marshall. The victim told appellant that she thought they had agreed that nothing would happen when she visited his house. He said, "Yeah, well, I was drunk. [¶] . . . [¶] [I]t's not even within my character to normally do that, but I got drunk and I kind of took it out on you. Like seriously, I'm really sorry. [¶] . . . [¶] . . . I am kind of a monster on the inside, and I'm really sorry about that." Appellant stated that he was very upset about something on the night of the offense and should have talked to her about it, "instead of just takin' it out on [her] sexually like that."

Nurse Sherri Anderson performs forensic exams on sexual assault victims at the Simi Valley Hospital emergency department. She examined the victim on March 5, 2006. The victim told Anderson that she visited appellant at his house. Before the visit, she told him she would not do anything with him because she was on her period. They went into his bedroom where they kissed. When he began to touch her and take off her clothes, she pulled away from him. He pinned her down and took off her shirt and then her pants. He pulled her tampon out of her vagina and placed his penis inside. He spit on his finger, wiped it onto his penis and put it inside her anus. She told him to stop, but he would not. He pulled out and ejaculated on her stomach.

Anderson testified that the vaginal exam appeared normal. There was some bleeding, consistent with a menstrual cycle. There was a laceration in her anal area. A Woods Lamp examination showed a semen-type splatter on the

victim's stomach. Sperm was detected on the swabs taken from her vagina and stomach. Swabs taken of appellant's saliva matched the DNA on the vaginal and stomach swabs. No DNA tests were run on the anal swabs, although they showed the presence of sperm.

Simi Valley Police Officer Christopher Martin testified that he had contact with appellant at about 1:00 a.m., on the night of the offense. He saw appellant urinating in public and intoxicated. Martin asked appellant to take his hands out of his pockets and he refused. Martin used an open palm and struck appellant in the chest, knocking him backwards onto the ground. Martin searched him, then contacted his sergeant, who came to the scene and questioned appellant. After speaking with appellant, the officers released him. On March 5, appellant filed a complaint at the police station.

#### *Defense Evidence*

Appellant's father, Mr. Fischetto, testified that, on the night of the offense, he heard appellant enter the house and close his bedroom door. He could not sleep. At about 3:15 a.m., he got up, made himself something to eat and sat on the sofa, which was about three and one-half feet from appellant's bedroom door. Mrs. Fischetto got up at 4:00 a.m., and sat with her husband for about 15 to 20 minutes, then went back to bed. Mr. Fischetto never heard any noise coming from appellant's bedroom. He saw light coming from underneath the door from a television, but there was no volume. Mr. Fischetto remained awake and performed various household chores until about noon. At approximately 1:00 p.m., he heard the front door open and close. Looking out the window, he saw a girl in a car parked in front of their home.

Mrs. Fischetto's testimony was substantially similar to that of her husband. She was awake most of the night because she had just had a double mastectomy and was in pain. She did not hear any noises in the house. When she heard the front door close at about 1:00 p.m., Mrs. Fischetto followed the victim

outside. She watched as the victim looked into the rear view mirror, brushed her hair, applied lipstick and made a call on her cell phone.

Appellant testified on his own behalf. He denied having raped the victim. After he arrived home, she followed him inside the house and into his bedroom. He brushed his teeth, changed his clothes, put on his boxers and got under the covers to go to sleep. The victim had previously told him that she was on her period and did not want to do anything. He had told her he wanted to sleep but she could hang out if she wanted to.

The victim leaned over and kissed him and they started making out. She removed her top and pants. He could not get an erection and rolled over and went to sleep. He briefly awoke at 10:30 a.m., went back to sleep and did not awaken again until 12:00 noon. At that time, appellant woke the victim and asked if she was hungry. She said she had to leave, so he walked her to the front door, then returned to his room and fell asleep. When he awoke, he saw a bloody tampon on the ground and threw it away. Appellant later called the victim and apologized for having been drunk.

## DISCUSSION

### *Appellant's Testimony Concerning Past Relationships*

Appellant claims the trial court erred by prohibiting him from testifying as to his prior relationships with women, thereby depriving him of his right to present a defense. During the defense case, appellant's counsel made an inquiry as to his previous relationships, and the prosecutor objected. Defense counsel explained that he wished to elicit appellant's testimony that he had always treated other girlfriends "respectfully and never had any complaints, never any overreaching, molesting-type conduct." The prosecutor objected again on the basis of relevance, arguing that the issue was whether the victim had consented, not the nature of appellant's prior relationships. The court sustained the objection.

All relevant evidence is admissible and the trial court has broad discretion in determining its relevance. (*People v. Riggs* (2008) 44 Cal.4th 248,

289.) Evidence Code section 352 provides that a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Riggs*, *supra*, at p. 290.)

This was a bench trial. At the time of the objection, appellant had testified that the victim tried to engage him in sex, but he was unable to get an erection and rolled over and went to sleep. He awoke briefly at 10:30 a.m., but went back to sleep until noon. Appellant's testimony was belied by the fact that his semen was found in the victim's vagina and on her stomach. It was established that sexual intercourse had occurred. What remained to be determined was whether the sex was consensual. To allow him to testify at length concerning his previous relationships was irrelevant to the matter before the court. The objection was properly sustained.

We also reject appellant's assertion that the trial court's refusal to allow him to testify to his prior relationships prevented him from presenting character evidence. A defendant is specifically authorized by statute to present good character evidence in any criminal case. (Evid. Code, § 1102, subd. (a); *People v. McAlpin* (1991) 53 Cal.3d 1289, 1313-1314.) Appellant's fiancée, two former girlfriends and a male and female friend all testified to his good character and stated that he is not inclined to sexually molest, attack or assault women.

#### *Victim's Statements to Sister*

Appellant contends that the victim's statements to her sister, Elena, were inadmissible hearsay. At trial, Elena described the victim's mental state when she arrived home. Elena testified that the victim was "barely able to talk, [was] crying, a mess." She was "very frantic, very, very, very upset." She told Elena that appellant had raped her. Elena continued to testify as to the statements the victim made while they were in the car en route to the hospital. The victim described to Elena "how [appellant] raped her and how he held her down and how he ripped out

her tampon . . . and that he raped her in the butt as well." Defense counsel made a hearsay objection, which the court overruled. It admitted the extrajudicial statements under the fresh complaint and spontaneous statement exceptions to the hearsay rule.

Under the fresh complaint doctrine, a victim's out-of-court statements disclosing an alleged sexual assault may be admitted for the limited non-hearsay purpose of showing that a complaint was made. (*People v. Brown* (1994) 8 Cal.4th 746, 756.) Such statements may be admitted "to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others . . . ." (*Id.* at pp. 749-750.) The victim's statement to Elena that "[appellant] raped me" was properly admitted as a fresh complaint.

An out-of-court statement purporting to describe an event "perceived by the declarant" is admissible where the statement is made "spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) Appellant claims that the spontaneous statement exception does not apply because there was no evidence that the victim "was in a state of excitement" when she made the statement, and too much time had elapsed since the startling event occurred.

The critical factor in determining whether an utterance is admissible as a spontaneous statement is the mental state of the speaker. (*People v. Brown* (2003) 31 Cal.4th 518, 541.) Factual circumstances may differ in each instance and the trial court "is vested with reasonable discretion in the matter. [Citation.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 719.) A short time had elapsed between the time the victim arrived home and when she left the house to drive to her friend's workplace. Elena followed her, knowing of her mental state and believing it would be unsafe for her to drive. Once inside Elena's car, the victim recounted the circumstances of the rape. It is apparent from Elena's testimony that the victim was still under the "stress of excitement" caused by the assault. The trial court properly admitted the statement made in the car under the spontaneous statement exception.



The judgment is affirmed.

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COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Edward F. Brodie, Judge  
Superior Court County of Ventura

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